

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DANIEL EDWARD CALLAHAN,

Plaintiff,

vs.

MUSKEGON COUNTY, et al.

Defendant.

Case No. 1:16-cv-208

Magistrate Judge Phillip J. Green

Daniel Edward Callahan
Plaintiff In Pro Per
2441 Winding Brook Court
Rochester Hills, MI 48309

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**RESPONSE OF DEFENDANT MUSKEGON COUNTY OPPOSING
PLAINTIFF'S MOTION TO FILE A SECOND AMENDED
COMPLAINT (ECF NOS. 31, 31-1 AND 34)**

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QUESTION PRESENTED

- I. WHERE PLAINTIFF CALLAHAN’S CURRENT (FIRST) AMENDED COMPLAINT (**ECF NO. 26**) IS SUBJECT TO DISMISSAL AS EXPLAINED IN DEFENDANT MUSKEGON COUNTY’S PENDING MOTION UNDER FED. R. CIV. P. 12(b)(6) (**ECF NOS. 29, 30**) AND WHERE PLAINTIFF CALLAHAN’S PROPOSED (SECOND) AMENDED COMPLAINT (**ECF NO. 31-1**) MERELY REPEATS VERBATIM THE SUBSTANTIVE ALLEGATIONS OF HIS EXISTING COMPLAINT, **SHOULD CALLAHAN’S MOTION TO AMEND HIS COMPLAINT BE DENIED AS “FUTILE?”**

Plaintiff Callahan answers: “No.”

Defendant Muskegon County answers: “Yes.”

COUNTER-STATEMENT OF FACTS

Plaintiff, Daniel Edward Callahan, filed his original Complaint in this court on February 26, 2016 (**ECF No. 1**). The sole Defendant referenced by that Complaint, Muskegon County, filed its answer. (**ECF No. 5**). The parties then participated in the preparation of an original and an amended “joint status report” (**ECF No. 9 and ECF No. 12**), and the parties participated in this Court’s scheduling conference held April 15, 2016 (**ECF No. 13, “Minutes”**).

With the nature of Plaintiff’s claims somewhat clarified by these proceedings, Muskegon County filed a motion under Fed. R. Civ. P. 12(c) seeking dismissal of Plaintiff Callahan’s complaint. After oral argument of the motion on July 6, 2016, this Court entered an order directing Plaintiff Callahan to file an amended complaint. (**ECF No. 22**).

On August 8, 2016, Plaintiff Callahan filed his (First) Amended Complaint. (**ECF No. 26**). Similar to Callahan’s original Complaint, his Amended Complaint is a series of rambling narrative paragraphs. Only Defendant Muskegon County has been served. The County has pending before this Court its motion and brief seeking dismissal of Callahan’s First Amendment Complaint. (**ECF Nos. 29 and 30**).

Reviewed line-by-line, Plaintiff Callahan’s proposed (Second) Amended Complaint (**ECF No. 31-1**) is a verbatim repetition of his First Amended Complaint (complete with spelling and grammar errors). The only “amendment” is the removal of “*other Unknown Correctional Officers in their official capacity as Muskegon County Jail Corrections Officer*” from the caption of Defendants. It is the position of Muskegon County that Plaintiff Callahan’s proposed Second Amended Complaint, like his First Amended Complaint and his original Complaint, still fails to state a cognizable claim against Muskegon County. Therefore, Callahan’s proposed amendment should be denied as “futile.”

STANDARD OF REVIEW

The amendment of complaints is controlled by Fed. R. Civ. P. 15. “Although the rule encourages courts to give leave to amend ‘when justice so requires’” courts “need not give leave to amend when doing so would be futile.” *SFS Check, LLC v. First Bank of Delaware*, 774 F.3d 351, 355 (6th Cir. 2014). A proposed amendment is “futile” if the proposed amendment “would not survive a motion to dismiss.” *Id.*, *Thiokol Corp. v. Dept. of Treasury, State of Michigan, Revenue Division*, 987 F.2d 376, 383 (6th Cir. 1993).

ARGUMENT

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). As explained fully in Muskegon County’s pending motion seeking dismissal under Fed. R. Civ. P. 12(c), Plaintiff Callahan’s present First Amended Complaint (like his original Complaint) fails to state a claim against Muskegon County. The County hereby incorporates into the present response the entirety of its pending motion and brief presenting the details of its dismissal argument. **(ECF Nos. 29 and 30).**

The only difference between Callahan’s current First Amended Complaint **(ECF No. 26)** and his proposed Second Amended Complaint **(ECF No. 31-1)** is the removal of the reference to “Unknown Corrections Officers” from the Defendants’ caption. Callahan offers no substantive change to the allegations of the complaint. Therefore, the proposed Second Amended Complaint would be subject to dismissal for the same reasons recited in Muskegon County’s pending motion seeking dismissal of Callahan’s First Amended Complaint. Therefore, as defined by the Sixth Circuit, Callahan’s proposed amendment is “futile.”

This Court has already afforded Plaintiff Callahan the opportunity to amend his Complaint to avoid dismissal. There is no justification to delay determination of the substance of Muskegon County’s pending motion only so that Plaintiff Callahan can submit further futile pleadings. Callahan’s motion to amend should be denied.

CONCLUSION AND RELIEF REQUESTED

For the reasons described above, Muskegon County asks this Court to deny Plaintiff Callahan's motion to file a (second) amended complaint (**ECF Nos. 31, 31-1 and 34**).

s/Allan C. Vander Laan
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Dated: September 16, 2016

CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2016, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system and served Plaintiff In Pro Per *via First Class Mail*:

Daniel Edward Callahan
2441 Winding Brook Court
Rochester Hills MI 48309

s/Karla Marsman
Karla Marsman
Legal Assistant
Cummings, McClorey, Davis & Acho, P.L.C.